MAY 27 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942:

No. 1051 72

MINA L. COWAN,

Petitioner,

vs.

FALLBROOK PUBLIC UTILITY DISTRICT, a Public Corporation,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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FALLBROOK PUBLIC UTILITY DISTRICT, a Public Corporation,

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Supporting Brief.

To the Honorable Supreme Court of the United States:

Mina L. Cowan respectfully prays that this court consider her petition and that a writ of certiorari issue to review the decision [R. 167] of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on November 20, 1942, reversing a decision of the District Court of the United States in and for the Southern District of California, Central Division; a Petition for Rehearing in said Circuit Court of Appeals was denied on December 31, 1942 [R. 179].

Opinions Below.

The opinion of the Circuit Court of Appeals in and for the Ninth Circuit is reported in 131 Fed. (2d) 513.

Jurisdiction.

The Petition for Rehearing by the Circuit Court, as above stated, was denied on December 31, 1942; no stay of the mandate was applied for or granted; on or about March 23, 1943, an application was made by counsel for your petitioner, requesting an extension of time within which to file this petition; that on March 26, 1943, The Honorable Wm. O. Douglas, Associate Justice of the Supreme Court of the United States, pursuant to said application, and good cause having been shown, extended the time for the filing of said petition to and including May 29, 1943. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., Section 347).

Statement of Facts Involved.

Your petitioner, Mina L. Cowan, and her attorney in connection with this petition, Wm. G. Junge, apologize to this Court, and respectfully request the indulgence of this Court in the event that any inaccuracy may appear in this petition or the brief in support thereof, for the reason that the attorney who represented your petitioner throughout the entire proceedings, before the Conciliation Commissioner, the District Court of the United States and the Circuit Court of Appeals for the Ninth Circuit, is no longer

engaged in the practice of law, and therefore, was unable to file this petition. The matter was submitted to your petitioner's present attorney some time after the petition for rehearing in the Circuit Court had been denied, and he, not having taken any part in any of the proceedings up to that time, found it necessary to examine and digest voluminous records, documents, transcripts and briefs in a comparatively short period of time. Misstatements may occur, but they are not intentional.

The facts involved in this matter can probably be best submitted to this Honorable Court by using the same statement which was made by the Circuit Judge [R. 168-171] as follows:

> "The District Court, upon review, affirmed an order of a Conciliation Commissioner-Referee in Bankruptcy, denying the petition of Fallbrook Public Utility District for permission to institute and maintain an action in the State Court against Mina L. Cowan, Debtor, and H. R. Cowan, her husband, to quiet title to certain real property, and to set aside a restraining order theretofore issued against it by the Conciliation Commissioner-Referee, which restrained it from selling or attempting to sell the referred to real property.
>
> "Fallbrook Public Utility District appeals (§§47, 48 Ti. 11, U. S. C. A).
>
> "Fallbrook Public Utility District was a public corporation, organized prior to the year 1933 (Cal. St. 1897, p. 254—Deering General Laws Act 3854, p. 1792), and existed until dissolved in 1938. At or

about the time of its dissolution, according to the terms of an alleged contract, made and entered into by and between it and Fallbrook Public Utility District, a public corporation (Cal. St. 1913, p. 450 and amendments), all of its assets were acquired by the latter.

"We shall refer to Fallbrook Irrigation District as Irrigation District, and Fallbrook Public Utility District as Utility District.

"Mina L. Cowan, herein called Debtor, is the farmer-debtor bankrupt (§203, Ti. 11, U. S. C. A.), and she claims an interest for the bankruptcy estate in certain real property affected by the restraining order within the territorial area formerly embraced in Irrigation District. That Debtor once owned the interest she is now claiming for the bankruptcy estate is undisputed, and it is likewise undisputed that Irrigation District assessments were allowed to go unpaid and that the District took Certificates of Sale for the property because of the delinquency in payment of the assessments.

"Thereafter, in a proceeding in the State Court, instituted by Irrigation District and authorized by the California Irrigation Act, in which notice was served upon all interested parties by publication, the State Court entered a decree, confirming the sale, including the Certificates of Sale. The decree further provided that deeds to the property described in the Certificates of Sale must be issued to Utility District by the County Treasurer of San Diego County, upon demand, provided the redemption period of three years had expired without payment. Payment was not made within such period, and Utility District took deeds in accordance with the decree. These deeds were issued more than four months before Debtor instituted these proceedings.

"Thereafter, and on March 12, 1940, the Secretary of Utility District dispatched a letter[1] to H. Cowan, Debtor's husband, in which it was stated that the Utility Board of Directors had set March 22, 1940, as the date the real property with which we are here concerned would be offered for sale if not redeemed theretofore.

"The property was not redeemed, but on March 20, 1940, eight days after the date of the Secretary's letter and two days before the date therein fixed as the date of the proposed sale, Debtor filed in the Bankruptcy Court under §75(s) Bankruptcy Act (11 U. S. C. A. 3203(s).). On the same day the matter was referred to the Conciliation Commissioner-Referee, who immediately issued the order Utility District desires to have cancelled. A few days later Debtor was declared a bankrupt under an amended petition.

"In addition to this recitation of facts, the Certificate of the Commissioner to the Judge contains findings to the effect that no water was made available to said lands by the Irrigation District. That upon petition of Debtor, the Irrigation District excluded some of the lands in which the Debtor owned an interest, but declined to exclude the property herein in question. That unpaid assessments were put under a ten-

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[1]"On February 20th we sent you a registered letter, in which we set for the various certificate numbers and amounts due on each, of the assessments levied by the Fallbrook Irrigation District and not paid. However, today we receive notice that this letter is being returned unclaimed.

"The total amount due on all parcels and including all certificates, is $1472.08 and the time limit in which to redeem has been set by the Board of Directors as March 22, 1940. Following that date, the property may be sold at public auction or otherwise.

"Trusting that you may be able to redeem your property, we are * * *."

year redemption plan and payment thereunder was made for the year 1936; that the Irrigation District continued to assess the property after issuance of Certificates of Sale; that the Utility District assumed to pay $1,463.00 to Irrigation District for all of its assets of valuable personal property, including sales certificates; that the value of the lands of Debtor is $15,000.00 (appraised at $12,500.00); that Debtor never received notice of Utility's petition for deeds to the San Diego County Treasurer; that the property has not been sold by the County of San Diego, nor the State of California, for delinquent County and State taxes."

Questions Presented.

1. Whether or not the farmer-debtor, the petitioner, on the date of bankruptcy had a property right in the land because of her right to redeem?

2. Should the Circuit Court on appeals determine the question of "absolute ownership" and dismiss the proceedings as to the property, and contrary to state statutes, and before the local State Supreme Court has adjudicated the matter of priorities between the owners of tax titles?

3. Should a Federal Court disregard evidence which might be urged in State Court proceedings involving the validity of assessments and a subsequent sale thereunder?

4. Should the Utility District be permitted to retain as its own, property appraised at $12,500.00, which it obtained through foreclosure of a questionable lien for the sum of $1472.00, which lien it obtained from its predecessor under an agreement to take all of the predecessor's assets, including the land in question for a total consideration of $1463.00?

Reasons for Granting the Writ of Certiorari and Errors Committed by the Circuit Court of Appeals.

I.

The Court below has decided an important question of law conflicting with local State decisions.

(a) The findings of the Conciliation Commissioner as set forth [R. 53] reads as follows:

> "That the said property of the debtor has not been sold by the State of California nor the County of San Diego for the delinquent general county taxes. That the said debtor still has the right to redeem the said property from the County of San Diego and the State of California under the delinquent general taxes.
>
> "That the rights of the debtor to redeem under the delinquent general county taxes still exists, and that such rights are equal to, if not greater than, the rights of the petitioner herein under its alleged tax deeds."

(b) If a tax lien is held by the County of San Diego and an assessment lien is held by the public utility, then, under the laws of the State of California, your petitioner still has a right to redeem and have the matter of priorities determined by a local court. This, for the particular reason that the laws of the State of California have, as yet, not determined the priorities between tax title holders and [R. 141] the State of California as the owner of a tax title deed to said property subject to redemption.

(c) Your petitioner, as a "farmer-debtor" is entitled to redeem and preserve an important property right.

Collins v. Welch, 75 Fed. (2d) 894;
In re Gunder, 88 Fed. (2d) 284;

Kalb v. Feuerstein, U. S. Supreme Ct., Jan. 2, 1940, 116 Fed. (2d) 775;

La Mesa Lemon Grove and Spring Valley Irrigation Dist. v. Hornbeck, 216 Cal. 730.

II.

The lower court has decided an important question in conflict with the weight of authority in that it declared the Utility District to be "absolute owner" of the property, although local decisions do not so rule.

La Mesa Irrigation Dist. v. Hornbeck, 216 Cal. 730 at pages 735 and 738;

Provident Land v. Zumwalt, 12 Cal. (2d) 365;

El Camino Irr. v. El Camino Corp., 12 Cal. (2d) 378;

Clough v. Compton Irrig. Dist., 12 Cal. (2d) 385;

Moody v. Provident Irrig. Dist., 1 Cal. (2d) 389;

Peoples Bank v. Imperial Irrig., 15 Cal. (2d) 397, at 402;

Mangus v. Miller, 317 U. S. 178.

III.

The lower court has decided an important question of Federal law, which has not been, but should be decided by this court; *i. e.*, Is the privilege of redemption after foreclosure of an assessment lien a "Valuable property right in a bankruptcy proceedings"?

IV.

The lower court should have referred the question of tax title ownership to the State Court for decision, and should not have dismissed the proceedings as to the property involved.

ARGUMENT IN SUPPORT OF PETITION.

I.

Whether or Not the "Farmer-Debtor," the Petitioner Herein, on the Date of Bankruptcy Had a "Property Rright" in the Land Because of Her Right to Redeem?

Petitioner unquestionably, at one time, owned the property and the interest she now claims [R. 169], and it is likewise true that the Utility District obtained Certificates of Sale for the property, because of delinquency in payment of assessments [R. 169]. A judgment obtained by the Utility District in the State Court entered a decree confirming the sale, but also provided for a redemption period [R. 169]. Payment was not made in accordance with the decree, but a letter was written by the secretary of the Utility District to your petitioner's husband, which letter your petitioner claims granted an extension of time [R. 170]. Before this claimed extension expired, the bankruptcy proceedings were instituted. The property was also subject to San Diego County taxes, but has not been sold by the County of San Diego nor the State of California for taxes [R. 171].

The property right which we claim was, by the filing of the bankruptcy petition, placed in the jurisdiction of the Federal District Court; *Collins v. Welch*, 75 Fed. (2d) 894; *In re Gunder*, 88 Fed. (2d) 284. The settled policy of the law is to allow a delinquent owner to redeem his property and make his burdens as light as possible.

Thompson v. Clark, 6 Cal. (2d) 285, at 291;

Anglo Cal. Nat. Bk. v. Leland, 9 Cal. (2d) 347, at 352.

It is well established in California that an irrigation district and public utility, such as the Fallbrook Public Utility District involved herein, is an agency of the State, whose functions are considered exclusively governmental; that it owns no land in a proprietary sense, the property being owned by the State and held only for governmental purposes; that the property acquired by the district must be held in trust and dedicated and set apart to the uses set forth in the Act.

Provident Land v. Zumwalt, 12 Cal. (2d) 365;
El Camino Irr. v. El Camino Corp., 12 Cal. (2d) 378;
Clough v. Compton Irrig. Dist., 12 Cal. (2d) 385;
Moody v. Provident Irrig. Dist., 1 Cal. (2d) 389;
Peoples Bank v. Imperial Irrig., 15 Cal. (2d) 397, at 402.

This establishment of a utility district as an agency of the State, and that its property is owned by the State, definitely places the petitioner at bar in the same position as that of the State of California. The Political Code sections pertinent to the right of redemption of a property owner of tax deeded land are therefore controlling. Sections 3780 and 3785a provide for the redemption right by the owner or any party in interest within five years of the date of sale to the State or at any time prior to the public sale of the lands by the State; likewise, section 3817 provides for redemption before the State has disposed of the land by paying to the County Treasurer the amount of taxes and penalties. Sections

3897 and 3897-d are also most significant in this respect; they make provision for the various taxing agencies, such as irrigation and reclamation districts, to file claims with the County Treasurer for a pro-rate payment to them of the amount of their delinquent tax assessments within six months after a public sale has been had of the land by the State and no redemption was made; *there are other provisions in said section 3897-d which indicate that the irrigation districts' rights are subordinate to those of the county general taxes.*

See:

La Mesa Irrigation Dist. v. Hornbeck, 216 Cal. 730, at pages 735 and 738.

There were certain sales of property, theretofore owned by this petitioner, in 1938 and certain additional sales on September 2, 1938. Is it not reasonable to suppose that redemption from these several sales could be made at any time prior to the same date in 1941? Particularly, in view of the fact that we must bear in mind that the bankruptcy proceedings were filed on March 20, 1940.

We, therefore, urge that petitioner has not lost her redemption rights, particularly in so far as the County of San Diego is concerned, which rights are equal to if not greater than any rights existing under the questionable tax deeds held by the Irrigation District. This statement is borne out in substance by the findings of the Conciliation Commissioner [R. 53].

II.

Should the Circuit Court of Appeals Determine the Question of "Absolute Ownership" and Dismiss the Proceedings as to the Property and Contrary to the State Statutes, and Before the Local Supreme Court Has Adjudicated the Matter of Priorities Between the Owners of Tax Titles?

The Circuit Court held in its decision that *"on this date the Utility District became the absolute owner of the property"* [R. 174]. With due respect to the ruling of that court, we are unable to satisfy ourselves as to how such a statement could be arrived at in view of the fact that no quiet title or other suit has as yet determined the rights of the Utility District, either as against your petitioner or the County of San Diego; and in view of the further fact, that since no sale has been made by the County of San Diego for delinquent taxes, certainly the redemption period is still in effect. It must be obvious that the Utility District cannot at present be the "absolute owner," because of the decisions above referred to and since the Supreme Court of this State has never decided priorities between tax lien owners [R. 141, subd. 4]—

> "That the Utility District is the owner of a tax title deed to said property which is held by the State, subject to the right of redemption for the nonpayment of general county and state taxes assessed against said property." [R. 53.]

La Mesa Irrigation Dist. v. Hornbeck, 216 Cal. 730, at pages 735 and 738;

Kuback v. McGuire, 199 Cal. 215;

Inglewood v. County of Los Angeles, 207 Cal. 697;

Mangus v. Miller, 317 U. S. 178 (rehearing denied Jan. 4, 1943).

As stated by Judge Jenney in *In re American Fidelity Corporation,* 28 F. Supp. 462 at 468,

> "* * * it is the very *quintessence* of exclusive jurisdiction for the Federal Court to permit the state court to try a certain issue when it feels that the state court is in a better position to determine the same expeditiously."

If it is true, as we believe, that the District does not have "absolute title," and if it is true that redemption is still possible, in so far as this petitioner is concerned under the San Diego County tax assessment, and possibly under the District levy which ripened into tax deeds, and if it is true that the matter should be referred to the State Court for adjudication prior to a ruling by a Federal Court, *then, should this Honorable Court not review the opinion of the Circuit Court and reverse the same and give petitioner an opportunity to urge her respective defenses in the State tribunal?*

The defenses she would urge are: *First,* that the assessment District levy was fraudulent, improper and illegal [R. 48]. *Second,* that the sale of the property for said alleged illegal assessments was "a shock to the conscience of the court" [R. 51]. Third, that Exhibit "E" introduced by petitioner [R. 77] granted an extension of time to your petitioner within which to pay the delinquent assessments, so that in her bankruptcy proceedings she still retained a valuable property right, because said proceedings were instituted prior to the expiration date referred to in Exhibit "E."

La Mesa Irrigation Dist. v. Hornbeck, 216 Cal. 730, at page 738.

"We can accord no controlling weight to the contention in this connection that petitioners have tax titles which do not permit of redemption by the property owners and for that reason are in a superior position to the governmental arms of the state which give the property owner a right of redemption at any time before sale. (Pol. Code, secs. 3897a and 3897b.) But the statute under review is not made for irrigation districts alone; it provides for a cancellation where the property is owned by the state or any of its agencies and the ownership is of such a character that it may not be sold for delinquent taxes or assessments. Moreover, sections 47 and 48 of the irrigation law do not specifically declare that such title extinguishes the claim of all other agencies of the state. The rule of law that the state may not be thus precluded without specific provisions to that effect is well established. (Kubach v. McGuire, 199 Cal. 215; Inglewood v. County of Los Angeles, 207 Cal. 697.)

"These citations also dispose of the claim that under section 48 of the irrigation law the title to the district is 'free of all encumbrances' and thus the state is precluded. This position is clearly untenable."

III.

Should a Federal Court Disregard Evidence Which Might be Urged in a State Court Proceeding Involving the Validity of Assessments and a Subsequent Sale Thereunder?

The Circuit Court in its opinion takes the position that since the District Court Judge adopted the findings of the Commissioner-Referee, except the portion thereof reading as follows:

> "That the lands of the debtor were subjected to the assessments and alleged liens of the former irrigation district without any benefit whatsoever accruing to the debtor or the said lands of the debtor, and upon the dissolution of the said Irrigation District, the said debtor and the said lands were saddled with the alleged lien and assessment and penalties which were assigned to the petitioner, Fallbrook Public Utility District, without any consideration whatsoever passing to or being received by the debtor" [R. 172].

he was eliminating any consideration of the validity of the assessments on the score of not furnishing water to the land [R. 172].

Naturally, the Honorable Circuit Court has the right to place any construction on such a situation that it may choose; *however*, we take the position that since this entire matter is one that should be finally decided by the State Court and not by a Federal tribunal, the Circuit Court should have considered all the evidence, including that above referred to, *before reversing* the District Court's

decision and dismissing the property from the bankruptcy proceedings.

We urge this point because we feel it is clearly allied with point No. II (*supra*), and feel that the legal propositions and cases cited there are applicable in connection herewith. We respectfully ask the Court to consider point No. II and this point, No. III, together, bearing in mind also that the Circuit Court arrived at its opinion, to wit, *"on this date the Utility District became the absolute owner of the property"* [R. 174] on the theory that, *first*, the finding herein referred to was stricken from the District Court findings and thus eliminated the consideration of the validity of the assessment; and *second*, that the letter dated March 12, 1940, sent by the secretary of the Utility District to petitioner's husband [R. 170], being Petitioner's Exhibit "E" [R. 77], did not *extend the statutory right of redemption, but was merely* "an offer on the part of the Utility District" [R. 174].

This Honorable Court is well aware, after reading the record, *that the title to the real estate involved in this case is in a confused condition and will ultimately require adjudication by the State Court* as to the respective rights of the Utility District, your petitioner, and also the County of San Diego.

For years, the experience of the Bench and Bar has been that tax titles create litigation, and while certain phases of tax deeds and tax deed titles have been decided, *each case submitted to the local tribunal raises serious and novel questions that are not covered by local statutes.* We again respectfully refer to the statement made by Judge Jenney in *"In re American Fidelity Corporation,"* (*supra*).

IV.

Should the Utility District Be Permitted to Retain as Its Own, Property Appraised at $12,500.00, Which It Obtained Through Foreclosure of a Questionable Lien in the Sum of $1472.00, Which Lien It Received From Its Predecessor Under an Agreement to Take All of the Predecessor's Assets, Including the Land in Question for a Total Consideration of $1463.00.

It may be true that no element of fraud or mistake is present in the proceedings which led up to the foreclosure of the Utility District's lien; and it may also be true that the foreclosure of this property and the sale thereof for Fourteen Hundred and Seventy-two ($1472.00) Dollars, owed by the debtor, does not fall into the category of *"de minimis"* [R. 175], but with all due respect to the ruling of the Honorable Circuit Court of Appeals, we are not able to determine why the effect of these two facts should not be submitted *to the highest court of the State in which the land is located.*

We believe that this Honorable Court will take judicial notice of the fact that before the title to the land in question, in so far as the Utility District, your petitioner, or the County of San Diego and its successors in interest, can be finally cleared and determined, it is a certainty that State litigation must be carried on between these several interested parties; and that in such litigation, all matters pertaining to the levy of the assessment, as well as the foreclosure and subsequent sales, will be offered as evidence to the State Court and will be ruled upon in one way or another.

Irrespective of what may have gone on before in the litigation, which followed the adjudication in bankruptcy, your petitioner, in our opinion, in any State Court proceedings will be within her rights if she presents evidence of fraud, mistake, irregularities in levying of assessments and irregularities in foreclosure. The Court, no doubt, will also be interested in determining the basis of the foreclosed lien, and it will then be the proper time to ascertain and obtain a ruling as to whether or not the sale of property worth $12,500.00 for a lien of $1472.00 under the circumstances evidenced by the record is *"de minimis"* or not.

There would be no reason for the filing of this petition, or the taking of the time of this Honorable Court and its distinguished judges, if the laws and decisions of the State of California were such as to establish a precedent which could be considered a guide or a "beacon light". We, however, need not investigate the innumerable tax title cases in this State, or the public utility or irrigation district tax title cases, to determine that the cases above cited under heading No. II are sufficient to advise us that there is no *"final decision on the subject in this State"*. All of the cases above cited on the subject are recent decisions, and we also feel that the case of *Mangus v. Miller*, decided by this Honorable Court and reported in 317 U. S. 178, involves facts and circumstances similar to those involved in our situation and that there the Court ruled substantially in accordance with our argument in this petition.

We respectfully suggest that since this is a matter for State determination, based upon the laws and decisions now in effect in the locale of the property, that the entire matter should be ruled upon by the courts of this State exclusively.

In conclusion, it is further respectfully submitted that this Court should issue its WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: May 24th, 1943.

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